Comments On the
Task Force on Improving the National Environmental Policy Act and
Task Force on Updating the National Environmental Policy Act
Committee on Resources
United States House of Representatives
Initial Findings and Draft Recommendations

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The following comment responses are respectively submitted and are not intended to reflect adversely on any individual nor the esteemed congressional committee as a whole. The comment responses are intended to provide constructive criticism and assist congressional leaders in avoiding actions that this nation might later regret. Our bios are described below:

Dr. Daniel Mandelker is a Stamper Professor of Law, Washington University in St. Louis. He is the author of NEPA Law and Litigation and the author of the chapter on NEPA for the Transportation Research Board's environmental chapter in their treatise on highway law. He has also published reports on corridor preservation for the Federal Highway Administration, and has served on the advisory committee on legal research for the Transportation Research Board.

Dr. Charles Eccleston is a NEPA consultant with nearly 20 years' experience preparing NEPA and scientific analyses. Much of his professional career has been dedicated to analyzing planning process problems and developing cutting edge tools, techniques, and approaches for resolving inefficiencies and improving NEPA practice. To promote the goal of improving NEPA, he has published three books on NEPA and approximately 35 papers in national and international journals which have focused on evaluating problems in NEPA, and offering innovative solutions for improving and streamlining NEPA planning. He also teaches NEPA seminars to educate professionals in the use of modern tools, techniques, and approaches for improving and streamlining NEPA practice. His effort and accomplishments in improving NEPA practice are acknowledged in Marquis' *Who's Who in America, Who's Who in the World,* and *Who's Who in Science and Engineering.*

GENERAL COMMENTS

1. Amending NEPA is Unnecessary

It is critical to point out that in virtually every case we have ever encountered, the *root* problems for inefficiencies or ineffective decisions has been the result of poor implementation or other related problems, and not due to the NEPA act itself. None of the proposed NEPA amendments are necessary. As described below, some of these

amendments are unpractical, while others are would unduly restrict basic democratic freedoms, or in some instances actually increase costs and project delays.

2. Faulty and Inadequate Input from Taskforce Hearings

A) Having witnessed and reviewed the committee's hearings process, it is my opinion that the hearings were not carried out in an objective manner that is necessary to obtain information on which to draw valid conclusions. For example, after being caught off guard at the hearing located in Rep. McMorris's own district city of Spokane, Washington, the location of future hearings were changed from major population centers where the taskforce might meet a future groundswell of NEPA support as it did in Spokane, to mainly obscure locations frequented by large proportions of farmers, ranchers, mining, and other special interests.

Moreover, the taskforce provided only short public notification of future hearings; critics have charged that this was intentionally designed to prevent NEPA proponents from mobilizing. Perhaps most alarming was that a substantial majority of the spokespersons invited to these hearings represented special interest groups who were generally opposed to NEPA.

For example, Mr. Claude Oliver (a conservative Republican county commissioner from Benton county Washington, not far from Rep. McMorris' district city of Spokane, Washington) was involved in a NEPA law suit *in support* of a *nuclear* proposal. A NEPA lawsuit was the last tool available for his group to challenge what he considered to be an anti-nuclear action. Based on their first real experience with NEPA, Mr. Oliver and his largely conservative Republican citizens group wanted to attend the hearings to share there positive experience with NEPA. He personally contacted Congressional staff members in an attempt to obtain approval to speak at the hearing, but was denied permission. Mr. Oliver later expressed distain and disgust with the closed and biased manner in which the hearing was held in Spokane.

Given the way these hearings were conducted it comes as no surprise that the report is riddled with factually incorrect statements, unsubstantiated opinions, and misleading conclusions (described in detail below).

B) Perhaps as a consequence of the hearing process, the report is principally grounded on antidotal reports and is surprisingly short on statistical, referenced, or documented data.

3. Factual Errors

A) The congressional report begins its introduction to the subject of litigation by making a factual error. On page 11, the report states that, "It was further noted by a number of environmental commenters that of the approximately 50,000 EISs filed each year only 0.2% resulted in litigation." (page 11).

The number of EISs that have been prepared over the entire history of NEPA is estimated to be somewhat over 20,000.[1] The number 50,000 is the upper end of the Council of Environmental Quality's (CEQ) estimate of the number of EAs that are prepared each year. This report should be changed to correct this factual error.

B) On page 11, the report states that "…the Task Force was told that there was an argument to be made that NEPA played a role in blocking a floodwall project that may have prevented the flooding of New Orleans in the aftermath of Hurricane Katrina…" (page 11).

Outlandish statements such as this demonstrate the misleading and inaccurate information reported to the taskforce during its hearings by opponents of NEPA. Nor should such fallacious statement ever have been published on the esteemed US House of Representatives webpage.

In fact, Professor Thomas O. McGarity of the University of Texas, School of Law has written a detailed rebuttal to this ridiculous and disingenuous accusation, titled "Lake Ponchartrain Barrier Project Litigation Talking Points Center for Progressive Reform" (September 9, 2005). As a scholar, Professor McGarity carefully traces the history and step-by-step decisions that were made with respect to this New Orleans flood control project. He has conclusively proven beyond any doubt that the *National Environmental Policy Act (NEPA)* was not responsible for the later failures, delays, and poor decisions that followed. In fact, had NEPA properly been followed such an event might have been prevented. The committee report needs to retract this falsehood and publicly acknowledge that this statement is factually incorrect.

4. NEPA Litigation

The Congressional report stated on page 11 that "In summary, with respect to NEPA actions and litigation, taking the average number of NEPA documents filed annually and the 2004 NEPA injunction figures, a 99.97% rate of NEPA actions successfully completed without injunctions does not provide a factual basis to prompt an excessive caution on the part of agency personnel. Even looking at the relatively modest number of NEPA cases filed, in 2004 in 93% of them the judge did not issue an injunction."

Given the reports own admission that law suites are neither filed nor delay the overwhelming majority of projects, one must seriously question why the committee believes there is such a pressing urgency to revise criteria defining who and how a suit can be lodged.

The following table depicts the principal reasons that NEPA suites have been filed. In the relatively small number of NEPA suites brought by plaintiffs, nearly 40% of the cases simply involved failure of the federal agency to prepare an appropriate NEPA

[1] Eccleston C. H., *The NEPA Planning Process: A Comprehensive Guide with Emphasis on Efficiency*, John Wiley & Sons, New Your N.Y., Chapter 5-6, (www.wiley.com), p373, 1999.

document at all.[2] In other words, the principal reason for suites involved straightforward issues of outright noncompliance. If the ability to bring a suite is impaired, the principal tool available to American citizens to force federal agencies to comply with the law will be severely weakened.

Causes for Action Filed Under NEPA in 1994	
Causes of Action	**Percent**
No environmental impact statement	24
Inadequate environmental impact statement	31
No environmental assessment	10
Inadequate environmental assessment	22
No supplemental environmental impact statement	5
Other	8

In many cases, a suit is the only avenue available for the "small man" to fight federal actions on an even playing field. Restricting this avenue is the political equivalent of eliminating one of few rights American citizens have to redress egregious actions.

Finally, there is a popular misconception that NEPA is a tool used by "wild eyed" left-wing environmentalists to slow or halt progress. In reality, individuals and citizens groups, state and local governments, business groups, property owners and residents, and Native American tribes make up 55 percent of the plaintiffs who have brought suites against the federal government on behalf of NEPA (See table below).[3] To restrict the right of these organizations and governments to bring a NEPA suit is the political equivalent of denying these parties their day in court. In fact, lawsuits are used by many average citizens and citizens groups to force federal agencies to seriously consider the implications of their decisions. In one case, a citizens group actually used NEPA to sue a federal agency to *save* a nuclear facility from destruction.[4]

[2] Reinke C. C. and Robitaile, "NEPA Litigation 1988-1995: A Detailed Statically Analysis," Proceedings of the 22nd Annual Conference of the National Association of Environmental Professionals, Orlando Fl, 1997, pp759-765.

[3] Reinke C. C. and Robitaile, "NEPA Litigation 1988-1995: A Detailed Statically Analysis," Proceedings of the 22nd Annual Conference of the National Association of Environmental Professionals, Orlando Fl, 1997, pp759-765; and
Eccleston C. H., *The NEPA Planning Process: A Comprehensive Guide with Emphasis on Efficiency*, John Wiley & Sons, New Your N.Y., Chapter 5-6, (www.wiley.com), p383, 1999.

[4] Eccleston, Pers. Communications, 2006.

Table 3.15 Breakdown of Lawsuits by Plaintiffs in 1994	
Plaintiffs	**Percent**
Environmental groups	45
Individuals and citizens groups	21
State governments	2
Local governments	8
Business groups	12
Property owners or residents	11
Native American tribes	1

5. NEPA is not Functionally Equivalent to State SEPA Processes

Another example of the report's incorrect conclusions based on an over reliance on antidotal reports rather than scientifically validated studies is the following. "…the state of Texas has environmental procedures similar to NEPA yet the process of a permit takes only 25-35% of the time it takes a Federal agency such as the Bureau of Land Management." (Page 15).

This statement appears to refer to the Texas state environmental policy act (SEPA). While many states have SEPA processes "similar" to NEPA, most are much less comprehensive and less protective than NEPA; the reason this process only takes 25-35 percent as long as NEPA should be clear. It is a superficial planning process compared with NEPA. I can categorically testify that Washington's process is generally much less rigorous and in some instances virtually a waste of time in terms of assessing project impacts and providing decision-makers with decisive information on which to base informed decisions; moreover, when compared to other state processes, Washington has one of the more stringent SEPAs processes.

These facts explain why the Texas process is significantly faster. With the exception of perhaps one state, no other state's SEPA process affords the protection requirements inherent in NEPA. Moreover, the "functional equivalent doctrine" has generally been restricted to the domain of the EPA and in no case am I aware of it being granted to any state.[5] The Congressional report should be revised to reflect this misleading statement.

[5] Mandelker D., *NEPA Law and Litigation.*

6. Duplicative Analyses

The following statement is made on page 16. "The Task Force was told that the current manner in which NEPA and other environmental laws are applied to a particular project can result in duplicative analyses that do not result in a more informed decision."

Such statements demonstrate the lack of an understanding on the part of many of the participants in the hearing. Most other environmental statutes prescribe detailed restrictions and standards that projects must meet. NEPA is *unique* in that it is the only *general-purpose* process applicable to the *planning* of *all* federal actions. In this way it is unique and not duplicative.

Moreover, some critics have criticized NEPA for consuming resources, yet not mandating specific project performance standards, as do other regulatory and permitting requirements. Yet, the subject agency is still burdened with NEPA's additional procedural requirements.[6] In reality, what at first appears to be a liability can, in fact, work in the agency's favor. From the standpoint of a project engineer, NEPA is actually one of the most favorable regulations. NEPA provides decision-makers and project engineers with a highly flexible planning process while not burdening project proponents with unwieldy requirements as do many other highly prescriptive permitting and regulatory requirements.

In contrast to most other environmental laws, NEPA allows an agency to include other factors, such as public sentiment, safety, risk, cost, and schedules, in reaching a final decision. NEPA imposes no straightjacket on federal decision-makers in terms of their final decision. Instead it provides a systematic scientifically-based mechanism for reaching rational decisions; in questioning the wisdom of a proposal, the best course of action occasionally turns out to be no-action. However in the majority of cases, a proposal is implemented, albeit with some modifications that reduce or even eliminate the significant impacts altogether.

Moreover, NEPA allows agencies to consider alternatives that lie outside its normal jurisdiction. Thus, the analysis can provide an agency with a rigorous and publicly reviewed basis for seeking a Congressional change in an existing law or requirement so that a more sensible or appealing alternative may be pursued. No other statute provides this type of flexibility.

In conclusion NEPA is not duplicative, and in many instances it provides benefits that no other statute can contribute to the federal decision-making process.

7. Document Length and Completion Time

A) On page 18, the report states that in 2000, the average Final EIS was 742 pages in length. Based on 20 years of professional experience, I can categorically testify that the *typical* EIS does *not* run 742 pages. This 742 page length appears to include appendices and other sections that are *not* part of the main body (e.g., paragraphs [d] through [g] of

[6] Eccleston C. H., *The NEPA Planning Process: A Comprehensive Guide with Emphasis on Efficiency*, John Wiley & Sons, New Your N.Y., Chapter 5-6, (www.wiley.com), 1999.

40 CFR §1502.10) of an EIS.[7] Moreover, this number probably includes programmatic and site-wide EIS which are special cases, normally excluded from the direction presented in §1502.10. Because of their large scope and often national implications, programmatic and site-wide EISs often run several thousand pages in length. These EISs can greatly skew statistics and lead to erroneous conclusions such as the one cited in this report.

The Environmental Protection Agency reviewed the document length of 270 final EISs filed during the calendar year of 1996. This study provides a more accurate assessment of compliance than the figure reported in the taskforce report since it assesses the CEQ page length direction in terms of the main body of EISs (40 CFR §1502.10). The results of the study are presented in the following table.[8] The average length (main body) of text was 204 pages *not* 742 as reported in the taskforce report. Most importantly, more than 1/3 of the EISs were *less than* 150 pages long and more than 3/4 fell below the 300 page limit. Based on the results of EPA's study, it can be concluded that EISs do not typically exceed CEQ page direction.

Average Page Length (Main Body) of EISs	
Section	**Average Page Length**
Purpose and need for action	11
Alternatives	36
Affected environment	66
Environmental consequences	91
Total Length (main body)	204

The US Department of Energy is an example of an agency that has a history of producing rather large and complex EISs. However, the DOE is an example of an agency that must struggle with highly complex and controversial issues having national and frequently international implications. The DOE has in fact an exemplary record complying with NEPA. It also has numerous documented case examples where NEPA has contributed greatly in implementing optimal courses of action. Witness the following documented case example.

In the early 1990s, the DOE was seriously considering a proposal to build a New Production Reactor (NPR) to produce tritium for the nation's aging nuclear weapons stockpile. DOE was under intense political pressure to move forward with the major multibillion dollar reactor. Former Naval Admiral and then-Secretary James Watkins (a Bush appointee), initially expressed resistance to the NEPA process and particularly the need to analyze a no-action alternative. The EIS was instrumental in determining a cheaper, faster, and more effective means for securing a national tritium supply. Based

[7] 40 CFR 1502.7.

[8] Eccleston C. H., *The NEPA Planning Process: A Comprehensive Guide with Emphasis on Efficiency*, John Wiley & Sons, New Your N.Y., Chapter 9, (www.wiley.com), p379, 1999.

principally on NEPA and other related studies, the Bush Administration made a decision in 1992 to cancel the NPR reactor. Watkins later exclaimed at a House Armed Services Committee hearing:[9]

> ***Thank God for NEPA****, because there were so many pressures to make a selection for a technology that might have been forced upon us, and that would have been wrong for the country.*

Admittedly, this EIS was large and costly, and it was necessary that it be so in order to effectively analyze a highly complex project with major national defense implications. This EIS was instrumental in identifying a superior path forward that saved the nation potentially billions of dollars and resulted in a project that was *completed on a much faster schedule* that the proposed NPR. An objective comparison of NEPA's costs and delays cannot be performed unless they are also balanced with project successes. The Congressional report should be revised to reflect misleading conclusions regarding the length of EISs.

B) The DOE reported that the average completion length for two recently completed EIS was 30 months.[10] DOE has already made significant progress in streamlining its NEPA process. Admittedly, this average exceeded the direction provided in the CEQ NEPA regulations and is longer than for most other agencies. However, DOE also deals with highly controversial and complex issues of national and international implications. It would be folly to believe that such analyses could be prepared within the timeframe proposed in the taskforce recommendations. The diverse type of agency missions, controversial issues, and complexity of analysis makes it unworkable to set a cap on the completion time for EISs. The report should be revised to reflect this fact and to avoid embarrassing political disasters that would result from such a recommendation.

8. Increasing Number of EISs

The report states that "There were 597 EISs filed with EPA in 2004, which is the greatest number since 1995. The number of EISs filed has been growing steadily since 2000." (page 18).

While there has indeed been an increase in the number of EIS filed in recent years, it is equally true that the this increase in on the heels of a relatively consistent decrease in the number of EIS since the 1970s.[11] In fact, preparation of EISs peaked in the early the early 1970, when nearly 2000 EISs were prepared a year.[12]

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[9] DOE, National Environmental Policy Act, *Learned Lessons*, June 2, 2003; Issue No. 35.
[10] DOE, National Environmental Policy Act, *Learned Lessons*, p 40, Issue No. 45, December 5, 2005.
[11] Eccleston C. H., *The NEPA Planning Process: A Comprehensive Guide with Emphasis on Efficiency*, John Wiley & Sons, New Your N.Y., Chapter 5-6, (www.wiley.com), p374, 1999.
[12] CEQ, Environmental Quality 1993: The Twenty-Fifth Annual Report, 1994-1995.

The Congressional report appears to suggest that an increase in the number of EISs is undesirable. In actuality, this increase reflects an increase in the number of major federal actions taking place across the country. Far from being undesirable phenomena this is a highly desirable goal as it reflects a vibrant, healthy, and dynamic economy with an increase in major federal projects. The Congressional report should be revised to reflect this misleading conclusion.

9. EIS Cost

On page 21, the report states that an "…EIS for a mine cost approximately "[$]250,000-$300,000 whereas in 2005 the same EIA can cost "$7-8 million or more."

This antidotal statement is another case of loose statements being made with no referenced data to substantiate the claim. While there may be special or complex cases where a mining EIS has run $7-8 million, this commenter is very skeptical that this represents a typical average mining EIS. Such examples should not be used to drawl general conclusions.

In reality, a DOE official (which because of its highly complex projects generates among the most expensive NEPA documents) reports that the cost of DOE's NEPA is nearly always less than 1.0%, and is typically less than .1%.[13] This observation leads to the following question: is a price tag of one percent or less to much to pay to ensure preservation of a healthy environment, to say nothing of generating superior project plans.

Placing an arbitrary ceiling on the cost of NEPA documents is equivalent to placing a cap on environmental quality and project planning, regardless of whether the increased funding would lead to correspondingly superior projects. Moreover, an objective comparison of NEPA's costs cannot be fairly and objectively performed unless they are also balanced against the direct and indirect cost savings that have been accrued from NEPA. The Congressional report should be revised to reflect misleading conclusions regarding the length of EISs.

10. Public Involvement and NEPA Cost-Effective

A) Prior to NEPA, federal planning and decision-making was often performed "behind closed doors," far removed from stakeholder input and public scrutiny. NEPA enables citizens to participate in the federal decision-making process through its public scoping, comment, and review process. No other general-purpose planning process affords the public with as much opportunity to provide input on federal projects that affect their lives. American citizens as never before are now able to participate in and influence proposals that may affect their lives during the planning process. Witness the following examples in which NEPA has allowed large cross-sections of the American public to provide input.

The DOE prepared a highly controversial EIS for the national Yucca Mountain Geologic Repository to store high-level radioactive waste. DOE performed 21 public

[13] Eccleston C. H., *The NEPA Planning Process: A Comprehensive Guide with Emphasis on Efficiency*, John Wiley & Sons, New Your N.Y., page 374, (www.wiley.com), 1999.

hearings and established a public comment period of almost 200 days for the Draft EIS. More than 11,000 comments (from about 2,300 letters and other submittals) were received on the draft EIS.[14]

But this does not even come close to the U.S. Forest Service's experience in preparing a highly controversial national EIS for its Roadless Area Conservation Program and related proposed rule, which would apply to about 160 National Forests and Grasslands. Public participation activities for the Roadless Area Conservation Program included about 450 public scoping meetings and hearings on the Draft EIS. In its scoping process, the Forest Service received more than 517,000 letters, cards, and other submittals, containing well over one million comments![15] Over a 60-day Draft EIS public comment period ending in July 2000, the Forest Service estimates that it received more than one million letters, cards, and other items, which include about 60,000 individually written letters – 6,000 of them from local, state, and Federal agencies.

Obviously, such voluminous numbers of public input and comments clearly demonstrates the profound affect that NEPA has had in terms of granting American citizens a say in federal decisions that directly affect them. Weakening NEPA is the political equivalent of announcing to the American public that their ability to participate within an open and democratic framework is being retracted. It would also weaken the ability of local, state, and federal agencies to provide input.

B) The following statement was made on page 22 "[T]hrough the interpretation of federal agencies NEPA has become in many instances a blunt instrument that results in frustrating public involvement and makes it much more difficult to arrive at thoughtful tradeoffs among transportation needs, project costs, community values, and environmental issues."

Besides being a confusing statement, this is also an unsubstantiated one. While it is true that some NEPA projects have resulted in less than satisfactory results, it is equally true that virtually any political process involving controversial projects has sometimes ended with unsatisfactory results or inability to achieve consensus. In truth public involvement has been among NEPA greatest achievements. Witness the following example.

An EIS was completed in 1996 for a highly complex and controversial project involving the disposition of 2,100 metric tons of radioactive spent nuclear fuel at the DOE's Hanford Site. One of the storage basins in which this fuel was held was so antiquated that radioactively contaminated water had leaked into the soil beneath the basin. The critical priority given to this project was underscored by the fact that a seismic event could result in an accident having potentially catastrophic implications. This was a highly controversial project with potentially catastrophic impacts. The NEPA process was instrumental in bringing opposing parties together in a unified effort that

[14] DOE, National Environmental Policy Act, *Learned Lessons*, September 1, 2000; Issue No. 24.
[15] DOE, National Environmental Policy Act, *Learned Lessons*, September 1, 2000; Issue No. 24.

expeditiously determined a safe disposition for the radioactive fuel.[16] In the words of Mr. Eric Gerber, the Spent Nuclear Fuel Project Manager:[17]

> *A decision was made to involve the stakeholders from the beginning. We discussed pending decisions before they were finalized and actually changed our plans based on stakeholder input. After ... seeing the impact of their recommendations on our decisions, the Project's credibility became established and stakeholder communications shifted from demands to team participation. An illustration of the success of this effort was the completion of the Project's Environmental Impact Statement in eleven months with few stakeholder comments; previously unheard of for major DOE projects.*

C) Public Consensus

NEPA provides federal agencies with an opportunity to debate vital and controversial national issues. Time and again, we have witnessed NEPA examples where by actively listening to and addressing the views of opposing groups, federal officials successfully reached a consensus on a path forward that would have been impossible otherwise. Numerous documented examples testify to this fact. In fact, a description of the no-action alternative has often been instrumental in convincing opposition groups of the need to achieve a path forward.

The nation is now faced with the critical need to establish a national energy independence program. This will be a controversial and contentious process. NEPA can be instrumental for achieving stakeholder consensus on a path toward energy independence. For example, NEPA can be instrumental in balancing the potential effects of nuclear energy against the potentially perilous impacts of global warming. Arfuably, oo other federal process provides such a powerful framework for doing so do so much with such little expenditures.

11. Decision-Making Effectiveness

A) On page 24, the following statement was made "…'excessive time and money' spent on NEPA documentation is not making for better decisions or for a better environment."

This is another unsubstantiated example which has led to incorrect conclusions. In fact many well documented cases exist where NEPA has led to superior decisions and a healthier environment.

In evaluating NEPA efficiency, one must balance the costs with project savings. Indirect project savings, which are often more difficult to account for, must therefore be included in any objective cost-benefit assessment. In reality, NEPA has saved Americans taxpayers innumerable dollars in terms of natural resource damage, clean up costs, poorly

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[16] DOE, *Management of Spent Nuclear Fuel From the k-Basins at the Hanford Site, Richland Wasington*, Final, DOE/EIS-0245, (61 FR 3922), 1996.

[17] Eccleston C. H., *Environmental Impact Statements: A Comprehensive Guide to Project and Strategic Planning*, John Wiley & Sons Inc, p 7, 2000.

planned projects, and other liabilities and economic encumbrances; in my professional opinion, NEPA has probably saved taxpayers far more money from by preventing botched and destructive projects that it has costs. This observation is evidenced by the following documented case example.

In 1994, the DOE issued a draft EIS for the Safe Interim Storage of Hanford Tank Waste (New Tank EIS).[18] The preferred alternative involved construction of up to six enormous high-level radioactive waste storage tanks with a projected price tag of $435 million. The need for additional storage space was considered urgent and political momentum was decidedly in favor of initiating tank construction as soon as possible; the project manager was determined to implement this project in record time (i.e., Project Momentum problem described earlier).

As the NEPA process proceeded, questions soon began to surface regarding the actual need and justification for additional waste tank storage space. Based on the NEPA scoping effort, it slowly became evident that the underlying need for this project was unjustified; the high-level radioactive waste could be processed using existing technology, reducing the volume and hence the need for additional tank storage capacity. Eventually, reconsideration of waste volume projections and management practices forced project management to conclude that construction of the additional tanks was unjustified. The project was canceled (e.g., no-action alternative). The cost savings, from this single decision alone was $435 million! This figure more than paid for DOE's *entire* NEPA process for many years into the future.

This cost savings exceeded the cost of DOE's entire NEPA process for many years into the future. Ms. Carol Borgstrom, director of DOE's Office of NEPA Policy and Compliance, stated that this was truly a "NEPA success story." A letter to the DOE from the Confederated Tribes of the Umatilla Indian Reservation, characterized this EIS as an excellent example for others to follow.

An objective comparison of NEPA's costs cannot be performed unless they are also balanced against the direct and indirect cost savings that have been accrued from NEPA. The Congressional report should be revised to reflect misleading conclusions regarding the cost and effectiveness of NEPA.

B) According to the NRDC, the DOE was last federal agency to accept NEPA. It was only under the threat of lawsuits that Secretary Watkins finally issued an order requiring full compliance with NEPA. Yet today, the DOE's Office of NEPA Policy and Compliance is one of the nation's leaders in paving excellent NEPA practice. More than simply an environmental planning process, DOE has turned NEPA into its general-purpose planning and decision-making process. This shows what can be accomplished when one takes what at first appears to be another cumbersome requirement and turns it into a force for positive change. If DOE can make such accomplishments, other agencies can as well.

The following study proves that NEPA can greatly improve planning and decision-making. The DOE published the results of a questionnaire, which was used in

[18] C. H. Eccleston, *The NEPA Planning Process: A Comprehensive Guide with Emphasis on Efficiency*, John Wiley & Sons, New Your N.Y., Introduction, (www.wiley.com), pp 2-3, 1999.

assessing the effectiveness of its NEPA process. As indicated below, more than 70% responded with a rating between "Effective" and Highly effective".[19] The DOE has reported a steady rise in the number of project respondents that have responded favorably.

NEPA Effectiveness Rating	% of Respondents
Not effective at all	3%
Not very effective	13%
Somewhat effective	7%
Effective	23%
Very Effective	23%
Highly effective	30%

COMMENTS ON RECOMMENDATIONS

Described below are specific comments on the recommendations presented in the report.

Recommendation 1.1: "Amend NEPA to define "major federal action." NEPA would be enhanced to create a new definition of "major federal action" that would only include new and continuing projects that would require substantial planning, time, resources, or expenditures."

Response: The courts have generally ruled and the CEQ has concurred that the term "major" reinforces the term "significantly." This avoids contradictions and unreasonable scenarios that would arise otherwise.

For example, some projects are very large but do not significantly affect the environment. If NEPA applied to "major" projects, an EIS could required for such a project even though it may have no significant affects.

Conversely, some projects and actions may be relatively small in terms of size, yet possess potentially catastrophic effects. Examples include projects involving nuclear materials/waste and experiments with highly lethal viruses; yet, if an EIS is determined based on "size," it could be concluded that a statement would not be required.

This recommendation should be rejected to avoid many problems that would result from redefining such terms.

[19] National Environmental Policy Act: Lessons Learned, U.S. Department of Energy, Quarterly report for first quarter of fiscal year 1996, March 1, 1996.

Recommendation 1.2: "Amend NEPA to add mandatory timelines for the completion of NEPA documents. A provision would be added to NEPA that would limit to 18 months the time for completing an Environmental Impact Statement (EIS). The time to complete an EA will be capped at 9 months. Analyses not concluded by these timeframes will be considered completed. There will obviously be situations where the timeframes cannot be met, but those should be the exception and not the rule. Before the time expires, an agency would have to receive a written determination from CEQ that the timeframes will not be met. In this determination, CEQ may extend the time to complete the documents, but not longer than 6 and 3 months respectively."

Response: As witnessed earlier, many NEPA planning successes have been documented which substantially exceeded CEQ's time limit (in some cases by several years). Placing arbitrary limits would gravely undermine NEPA in terms of contributing to excellent federal decision-making. Highly controversial and complex projects sometimes require years to develop a comprehensive plan and path forward, and obtain stakeholder consensus. While this recommendation might work for some agencies in limited circumstances, it would also be a visible and controversial embarrassment for others whose missions and issues are much more complex.

This recommendation would cause unworkable and embarrassing disappointments and should therefore be withdrawn. One alternative to this recommendation would be to require agencies to monitor and publish their EIS timelines. Also agencies could be required to perform periodic audits, studies, and value engineering workshops to identify methods for streamlining their EIS processes.

Recommendation 1.3: "Amend NEPA to create unambiguous criteria for the use of Categorical Exclusions (CE), Environmental Assessments (EA) and Environmental Impact Statements (EIS). In order to encourage the appropriate use of CEs and EAs the statute would be amended to provide a clear differentiation between the requirements for EA's and EIS's. For example, in order to promote the use of the correct process, NEPA will be amended to state that temporary activities or other activities where the environmental impacts are clearly minimal are to be evaluated under a CE unless the agency has compelling evidence to utilize another process."

Response: Given the varied and complex missions of different federal agencies, it is a practical impossibility to define unambiguous criteria that could be uniformly applied to <u>all federal agencies</u> regarding categories of CE, EAs, and EISs. Such criteria can only successfully be developed by individual agencies given their unique experiences, missions, and requirements.

Moreover, this is a confusing recommendation as it is redundant with the CEQ regulations which already require agencies to define classes of action involving CE, EAs, and EISs in their NEPA implementation procedures (40 CFR §1507.3[b][2]). The CEQ regulations recognize that this can only be reasonably done on a case by case basis by each individual agency based on their internal expertise and experience.

Given the vast spectrum of potential federal actions, this recommendation is both unworkable and impractical. It appears to show a lack of understanding of NEPA and the CEQ regulations and should be withdrawn.

Recommendation 1.4: "Amend NEPA to address supplemental NEPA documents. A provision would be added to NEPA to codify criteria for the use of supplemental NEPA documentation. This provision would limit the supplemental documentation unless there is a showing that: 1) an agency has made substantial changes in the proposed actions that are relevant to environmental concerns; and 2) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. This language is taken from 40 CFR 1502.9(c)(1)(i) and (ii)."

Response: As described in the CEQ regulations (also Section 1.1 [above]), a supplemental EIS is only *required* to be prepared based on the criteria presented in 40 CFR 1502.9(c)(1). This is a confusing recommendation as it is both redundant and unnecessary to codify these criteria by amending NEPA.

If the intention of this recommendation is to prevent *non-required* supplemental EISs from being prepared, this recommendation is counter productive to the goal of NEPA streamlining; an important method for preventing delays is to prepare a supplemental EIS during the very early planning stage and then supplement it when more information is available at a later date (40 CFR §1502.5[a]). Placing restrictions on the use of Supplemental EISs could actually be counterproductive, cause delays in some projects.

This recommendation appears to show a lack of understanding of NEPA and the CEQ regulations and should be rejected.

Recommendation 2.1: "<u>Direct CEQ to prepare regulations giving weight to localized comments</u>. When evaluating the environmental impacts of a particular major federal action, the issues and concerns raised by local interests should be weighted more than comments from outside groups and individuals who are not directly affected by that proposal."

Response: This recommendation is unwise as nonlocal residents could be potentially harmed by events such as a nuclear reactor accident or change in operating conditions of a dam, or introduction of a non-native invasive species that could eventually affect locations far from the site of a proposed action.

Moreover, people from distant locations use amenities such as national parks or visit historic resources that could be affected by a local proposal.

Finally, comments should be weighted in terms of the significance of the impacts they address and how important they are in terms of contributing to the decision-making process, not on who submitted them. This recommendation would severely hamper environmental protection and the ability to provide public input, and therefore should be withdrawn.

Recommendation 2.2: "Amend NEPA to codify the EIS page limits set forth in 40 CFR 1502.7. A provision would be added to NEPA to codify the concept that an EIS shall normally be less than 150 pages with a maximum of 300 pages for complex projects."

Response: As described in the earlier examples, this is an impractical recommendation that could have adverse impacts in terms of reaching superior decisions involving highly complex projects that could not possibly be adequately evaluated within the recommended page limits.

This recommendation is both unworkable and would result in embarrassing disappointments and should therefore be withdrawn. One alternative to this recommendation would be to require agencies to monitor and publish statistics on page lengths. Also agencies should be required to perform periodic audits, studies, or value engineering workshops to identify methods for streamlining and where practical shortening the length of the documents.

Recommendation 3.1: "Amend NEPA to grant tribal, state and local stakeholders cooperating agency status. NEPA would be enhanced to require that any tribal, state, local, or other political subdivision that requests cooperating agency status will have that request granted, barring clear and convincing evidence that the request should be denied. Such status would neither enlarge nor diminish the decision making authority for either federal or non-federal entities. The definition would include the term "political subdivisions" to capture the large number of political subdivisions that provide vital services to the public but are generally ignored in the planning for NEPA."

Response: This is a confusing recommendation as it is redundant with 40 CFR §1508.5 which already includes states and tribes within the definition of a "Cooperating agency." Specifically,

> "Cooperating agency" means any Federal agency other than a lead agency … A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency."

Given this CEQ definition, there is no need to amend NEPA or change the CEQ regulations

With respect to political subdivisions, the regulations have extensive provisions for ensuring that the views of stakeholders are captured and addressed in the NEPA process. This recommendation appears to show a lack of understanding of NEPA and the CEQ regulations and should be withdrawn.

Recommendation 3.2: "Direct CEQ to prepare regulations that allow existing state environmental review process to satisfy NEPA requirements. CEQ would be directed to prepare regulations that would, in cases where state environmental reviews are

functionally equivalent to NEPA requirements, allow these requirements to satisfy commensurate NEPA requirements."

Response: As elaborated on earlier, most SEPA processes are cursory processes that lack the rigor necessary to adequately evaluate projects and make informed decisions. In fact, most state SEPA processes defer to NEPA i.e., the state SEPA process does not normally have to be prepared as long as the more rigorous NEPA process has been satisfied.

It is doubtful that these cursory state processes would ever have led to the outstanding and cost-saving successes described earlier. This recommendation appears to show a lack of understanding of the standard NEPA practice and should be withdrawn.

Recommendation 4.1: "Amend NEPA to create a citizen suit provision. In order to address the multitude of issues associated NEPA litigation in an orderly manner the statute would be amended to create a citizen suit provision. This provision would clarify the standards and procedures for judicial review of NEPA actions. If implemented, the citizen suit provision would:

• Require appellants to demonstrate that the evaluation was not conducted using the best available information and science.

• Clarify that parties must be involved throughout the process in order to have standing in an appeal.

• Prohibit a federal agency – or the Department of Justice acting on its behalf – to enter into lawsuit settlement agreements that forbid or severely limitactivities for businesses that were not part of the initial lawsuit. Additionally,
any lawsuit settlement discussions involving NEPA review between a plaintiff and defendant federal agency should include the business and individuals that are affected by the settlement is sustained.

• Establish clear guidelines on who has standing to challenge an agency decision. These guidelines should take into account factors such as the challenger's relationship to the proposed federal action, the extent to which the challenger is directly impacted by the action, and whether the challenger was engaged in the NEPA process prior to filing the challenge;

• Establish a reasonable time period for filing the challenge. Challenges should be allowed to be filed within 180 days of notice of a final decision on the federal action;"

Response: Case law already defines criteria that parties must meet to lodge a citizen's suit. This recommendation would essentially squash the ability of many citizens and stakeholders to challenge federal projects that are pushed upon them by massive federal agencies. In many cases, this is the only avenue available for the "small man" to fight federal actions on an even playing field.

Given the fact that law suites do not delay or halt the overwhelming majority of projects, one must seriously question why there is any need to revise criteria defining who can lodge a suit. This recommendation should therefore be withdrawn.

Recommendation 4.2: "Amend NEPA to add a requirement that agencies "pre clear" projects. CEQ would become a clearinghouse for monitoring court decisions that affect procedural aspects of preparing NEPA documents. If a judicial proceeding or agency administrative decision mandates certain requirements, CEQ should be charged with the responsibility of analyzing its effects and advising appropriate federal agencies of its applicability."

Response: Given the fact that law suites are neither prevalent nor delay the overwhelming majority of projects, one must seriously question why there is any need to revise criteria defining who can lodge a suit. Such a change would deny American citizens the right to enforce NEPA's requirements in the statistically few cases where such action is necessary. This recommendation should therefore be withdrawn.

Recommendation 5.1: "Amend NEPA to require that "reasonable alternatives" analyzed in NEPA documents be limited to those which are economically and technically feasible. A provision would be created to state that alternatives would not have to be considered unless it was supported by feasibility and engineering studies, and be capable of being implemented after taking into account: a) cost, b) existing technologies, and (c) socioeconomic consequences (e.g., loss of jobs and overall impact on a community)."

Response: The CEQ has already issued guidance stating that "…reasonable alternatives include those that are practical and feasible from the technical and economic standpoint…" Based on my professional experience, the concepts of "technical" and "economic" are the principal criteria already used by NEPA practitioners in defining the scope of the "analyzed alternatives." Moreover, I have very rarely witnessed an alternative that was analyzed in detail that was also deemed to be either technically unfeasible or uneconomical.

A provision stating that alternatives would not have to be considered unless they are supported by feasibility and engineering studies, would provide agencies with free rein to avoid evaluating alternatives that they do not wish to consider; i.e., an agency could simply avoid evaluating an otherwise feasible alternative by simply refusing to prepare feasibility and engineering studies.

Finally the concept of "socioeconomics consequences" is an "impact" and should not be confused with the concept of an "alternative. Such *impacts* must be evaluated once an *alternative* has been defined and described. It makes no rational sense to require a socioeconomic impact to be included in determining if an alternative should be evaluated. Moreover, this suggestion leads to an analytical paradox since impacts can not even be adequately evaluated until after an alternative has been thoroughly defined and described.

These recommendations appear to show a lack of understanding of NEPA and the CEQ regulations and should be withdrawn.

Recommendation 5.2: "Amend NEPA to clarify that the alternative analysis must include consideration of the environmental impact of not taking an action on any

proposed project. A provision would be created that require an extensive discussion of the "no action alternative" as opposed the current directive in 40 CFR 1502.14 which suggests this alternative merely be included in the list of alternatives. An agency would be required to reject this alternative if on balance the impacts of not undertaking a project or decision would outweigh the impacts of executing the project or decision."

Response: This is a confusing recommendation as the consideration of the environmental impact of taking no action on the proposed project is already standard practice.[20] This requirement is also required under the CEQ regulations and by case law.[21] This requirement is illustrated as follows: A no-action alternative is a reasonable alternative (40 CFR §1508.25[b][1]), and as such, an agency must "devote substantial treatment" to the analysis of this alternative 40 CFR §1502.14 (b).

In fact such an analysis frequently provides justification for pursuing a proposed action. As described in the earlier example involving the New Tank EIS, mandating that an agency be required to reject the no-action alternative under certain conditions might have led the DOE to reject no-action alternative in the New Tank EIS which saved the agency $435 million. Such a provision is very unwise and could lead to wastefulness, political embarrassment, and major project failures. This recommendation appears to show a lack of understanding of NEPA and the CEQ regulations and should be withdrawn.

Recommendation 5.3: "Direct CEQ to promulgate regulations to make mitigation proposals mandatory. CEQ would be directed to craft regulations that require agencies to include with any mitigation proposal a binding commitment to proceed with the mitigation. This guarantee would not be required if (1) the mitigation is made an integral part of the proposed action, (2) it is described in sufficient detail to permit reasonable assessment of future effectiveness, and (3) the agency formally commits to its implementation in the Record of Decision, and has dedicated sufficient resources to implement the mitigation. Where a private applicant is involved, the mitigation requirement should be made a legally enforceable condition of the license or permit."

Response: The courts have already ruled that a mitigated FONSI is enforceable. Forcing agencies to make mitigation mandatory could lead to a Pandora's Box of problems. Moreover, it runs counter to rulings by the courts which have concluded possibly for good reason that mitigation is not enforceable (Robertson v. Methow Valley, 1999).[22] This recommendation is unnecessary and should be rejected.

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[20] DOE, National Environmental Policy Act, *Learned Lessons,* September 1, 2000; Issue No. 24.

[21] 40 CFR §1508.25 (b)(1).

[22] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 109 S.Ct 1835 (1989) (companion case to Marsh v. Oregon Natural Resources Council).

Recommendation 6.1: "Direct CEQ to promulgate regulations to encourage more consultation with stakeholders. As pointed out in testimony, the existence of a constructive dialogue among the stakeholders in the NEPA process and ensuring the validity of data or to acquire new information is crucial to an improved NEPA process. To that end, CEQ will draft regulations that require agencies to periodically consult in a formal sense with interested parties throughout the NEPA process."

Response: This is a confusing recommendation as the requirement to consult with stakeholders is already one the strongest requirements provided for in the CEQ NEPA Regulations. Moreover, many federal agencies already exceed these stringent regulatory requirements. This recommendation appears to show a lack of understanding of NEPA and the CEQ regulations and should be withdrawn.

Recommendation 6.2: "Amend NEPA to codify CEQ regulation 1501.5 regarding lead agencies. In regulation, the lead agency is given certain authorities. Legislation such as SAFE TEA-LU and the Energy Policy Act of 2005 has spoken to the need for lead agencies in specific instances such as transportation construction or natural gas pipelines. In order to reap the maximum benefit of lead agencies, their authorities should be applied "horizontally" to cover all cases. To accomplish this, appropriate elements of 40 CFR 1501.5 would be codified in statute. Additional concepts would be added such as charging the lead agency with the responsibility to develop a consolidated record for the NEPA reviews, EIS development, and other NEPA decisions. This codification would have to ensure consistency with lead agency provisions in other laws."

Response: Since section 40 CFR 1501.5 is already a regulatory requirement, one is left to wonder what would be achieved by amending the NEPA act to include this requirement. This recommendation should be withdrawn.

Recommendation 7.1: "Amend NEPA to create a "NEPA Ombudsman" within the Council on Environmental Quality. This recommendation would direct the Council on Environmental Quality to create a NEPA Ombudsman with decision making authority to resolve conflicts within the NEPA process. The purpose of this position would be to provide offset the pressures put on agencies by stakeholders and allow the agency to focus on consideration of environment impacts of the proposed action."

Response: Such a provision would limit NEPA's public participation process and is the political equivalent of announcing to the American public that their ability to participate within an open and democratic framework is being restricted. This recommendation should be withdrawn.

Recommendation 7.2: "Direct CEQ to control NEPA related costs. In this provision CEQ would be charged with the obligation of assessing NEPA costs and bringing recommendations to Congress for some cost ceiling policies."

Response: As documented earlier, the cost of NEPA is generally not out of line when compared with other project costs. For example, a DOE official (which because of its highly controversial and complex projects generates among the most expensive NEPA documents) reports that the cost of DOE's NEPA process is nearly always less than 1.0% percent, and is typically less than .1%.[23] This observation leads to the following question: is a price tag of less than one percent to much to pay to ensure preservation of a healthy environment, to say nothing of generating superior project plans?

NEPA projects vary substantially in size and complexity. Conversely, some relatively 'small' proposals can be much more complex or controversial that large projects. An EIS for a nuclear waste storage facility may be much more complex and controversial than an EIS for a water treatment plant.

Placing an arbitrary ceiling on the cost of NEPA documents is equivalent to placing a cap on environmental quality and project planning, regardless of whether the increased funding would lead to correspondingly superior projects. This recommendation is both unwise and potentially detrimental to project planning and should therefore be withdrawn.

Recommendation 8.1: "Amend NEPA to clarify how agencies would evaluate the effect of past actions for assessing cumulative impacts. A provision would be added to NEPA that would establish that an agency's assessment of existing environmental conditions will serve as the methodology to account for past actions."

Response: Such a recommendation could be performed by simply revising the NEPA Regulations rather than amending the NEPA act. But more importantly, this recommendation could create inefficiencies by eliminating innovative approaches for streamlining the analysis of cumulative impacts. For example, a new approach (i.e., Cilix Method) shows significant potential for improving and streamlining the analysis of cumulative impacts.[24] Placing restrictions on the analysis of cumulative impacts could actually have the reverse affect of restricting or complicating approaches such as the Cilix Method which show promise in terms of streamlining such analyses. This recommendation should be withdrawn.

Recommendation 8.2: "Direct CEQ to promulgate regulations to make clear which types of future actions are appropriate for consideration under the cumulative impact analysis. CEQ would be instructed to prepare regulations that would modify the existing language in 40 CFR 1508.7 to focus analysis of future impacts on concrete proposed actions rather than actions that are 'reasonably foreseeable.'"

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[23] Eccleston C. H., *The NEPA Planning Process: A Comprehensive Guide with Emphasis on Efficiency*, John Wiley & Sons, New Your N.Y., page 374, (www.wiley.com), 1999.
[24] Eccleston C. H., "The Cilix Methodology: A Practical and Streamlined Methodology For Assessing Cumulative Impacts in NEPA Environmental Assessments," (Scheduled for publication in 2006, Journal of Federal Facilities Environmental Management).

Response: The purpose for performing a cumulative impact analysis is to allow decision-makers to make wise decision based on a reasonable understanding of future events. As described in Recommendation 8.1, this recommendation could create inefficiencies by eliminating innovative approaches for streamlining the analysis of cumulative impacts. For example, a new approach (i.e., Cilix Method) shows significant potential for improving and streamlining the analysis of cumulative impacts.[25]

Moreover, experienced practitioners generally possess the skills to consider the impacts of reasonably foreseeable actions beyond those of simply concrete proposals. For this reason, this recommendation should be withdrawn.

Recommendation 9.1: "CEQ study of NEPA's interaction with other Federal environmental laws. Within 1 year of the publication of The Task Force final recommendations, the CEQ will be directed to conduct a study and report to the House Committee on Resources that:

a. Evaluates how and whether NEPA and the body of environmental laws passed since its enactment interacts; and

b. Determines the amount of duplication and overlap in the environmental evaluation process, and if so, how to eliminate or minimize this duplication"

Response: This may be a reasonable recommendation.

Recommendation 9.2: "CEQ Study of current Federal agency NEPA staffing issues. Within 1 year of the publication of The Task Force final recommendations, the CEQ (with necessary assistance and support from the Office of Management and Budget) will be directed to conduct a study and report to the House Committee on Resources that details the amount and experience of NEPA staff at key Federal agencies. The study will also recommend measures necessary to recruit and retain experienced staff."

Response: This may be a reasonable recommendation.

Recommendation 9.3: "CEQ study of NEPA's interaction with state "mini-NEPAs" and similar laws. Within 1 year of the publication of The Task Force final recommendations, the CEQ will be directed to conduct a study and report to the House Committee on Resources that at a minimum:

[25] Eccleston C. H., "The Cilix Methodology: A Practical and Streamlined Methodology For Assessing Cumulative Impacts in NEPA Environmental Assessments," (Scheduled for publication in 2006, Journal of Federal Facilities Environmental Management).

a. Evaluates how and whether NEPA and the body of state mini-NEPAs and similar environmental laws passed since NEPA's enactment interacts; and

b. Determines the amount of duplication and overlap in the environmental evaluation process, and if so, how to eliminate or minimize this duplication"

Response: This may be a reasonable recommendation.